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IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA

IN EQUITY.

No. 3004

MOUNTAIN STATES POWER COMPANY, A CORPORATION,

Complainant,

vs.

PUBLIC SERVICE COMMISSION OF MONTANA ET AL. AND THE CITY OF FORSYTH, MONTANA, A MUNICIPAL CORORATION,

Defendants.

STATEMENT OF JURISDICTION UNDER AMENDED RULE 12.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, as amended by Order of May 31, 1932, the above named complainant and appellant files this its separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the Decree of Dismissal appealed from herein, as follows:

(a)

The statutory provisions believed to sustain the appellate jurisdiction are Sections 238 and 266 of the Judicial

Code as amended (28 U. S. C. A., Sec. 345 (3) and Sec 380).

(b)

The Statute (Order) of the State, the Validity of Which is Involved.

This suit is one involving the validity of a formal written order of the Public Service Commission of the State of Montana, purporting to fix the value of complainant's electric system in the Forsyth, Montana district, and ordering drastic reductions in the company's rates for electric service (R. 6, 7, 20-24).

The Commission's order is dated September 23, 1935, requires the filing of the reduced rates on or before October 1, 1935, and makes such reduced rates effective as of October 1, 1935.

Evidence was presented by the complainant, in the record before the Commission, showing Book Cost to be $250,833.37; (R. 8, 33) Reproduction Cost, new, $235,737.00 (R. 7, 33); Reproduction Cost, depreciated, $206,864.00 (R. 7, 33); and the assessed value for tax purposes, of the electric system in question, to be $139,738.00 (R. 33).

The Commission, in its order, found the "Valuation for rate-making purposes" of said electric property, to be "not exceeding the sum of $90,000.00" (R. 21). It made no findings of value for any of the elements making up "fair value" (R. 21).

The Commission found the 1934 annual gross revenue from this system to be $49,268.65, the total 1934 operating expenses, including taxes and annual depreciation expense, to be $37,535.95 and the net operating revenue or income available for interest on investment (for the year 1934) to be $11,732.70 (R. 21).

The 1934 gross operating revenues were necessarily derived from rates in effect during 1934.

The evidence before the Commission disclosed that as of January 1, 1935 the complainant had put into effect, pursuant to an order of the Commission, a reduction in rates on the Forsyth system amounting to an annual reduction in revenue of $3,057.21, (R. 31). The effect of applying the reduced rates directed in the instant Commission order results in a further annual reduction of revenue in the amount of $11,233.60 (R. 11, 32). This makes a total reduction in gross revenue of $14,290.81, per year, as a result of the application of the two 1935 rate reductions. Deducting the $14,290.81 from 1934 gross revenue of $49,268.65 leaves gross revenue of $34,977.84, under the instant reduced rates. Under the reduced rates required by the instant Commission order, the operating expenses would exceed the gross revenues by $2,558.11 per year, with nothing whatever for return on the investment.

This clearly constitutes substantial, daily and continuing confiscation.

(c)

The date of the decree sought to be reviewed herein is April 9, 1936, and the date upon which the application for appeal is presented is April 17, 1936.

(d)

Nature of the Case and Rulings of the Court Bringing the the Case Within the Jurisdictional Provisions Relied Upon.

Upon receipt of the Commission order hereinabove referred to, the complainant, on September 28, 1935, filed with the State Commission a petition for rehearing and stay of its order, bringing to the attention of the Commission that the application of the reduced rates would result in the confiscation of complainant's property (R. 25-26). On Sep-

tember 28, 1935, the Commission entered a formal order denying said petition (R. 28).

Thereupon complainant commenced this suit in equity on October 1, 1935 to restrain the enforcement of the order, applied for a temporary restraining order and interlocutory injunction and moved to convene a three-judge court, which later heard the application for interlocutory injunction.

A temporary restraining order and order to show cause why interlocutory injunction should not issue, was signed by District Judge Pray on October 1, 1935. Under this order the complainant was required to impound with the court the difference between the existing and the reduced rates and furnish proper bond to guarantee compliance therewith (R. 38-41). The complainant filed the bond as required (R. 38-41) and has impounded and is continuing to impound, with the court the said difference in rates.

The bill of complaint alleged: (a) diversity of citizenship (R. 1, 4, 6), (b) the requisite amount in controversy, (R. 6), (c) that the laws of Montana prohibit the courts of that state from issuing an injunction *pendente lite* to restrain the enforcement of the Commission rate order (R. 14), (d) that complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the State, nor otherwise except by resort to the Federal district court to protect it against the confiscation of its property (R. 14, 15), (e) that enforced compliance with the Commission order resulted in immediate, daily, substantial and continuing confiscation in violation of the 14th Amendment to the Constitution of the United States (R. 14, 15), and (f) that the laws of Montana provided severe, recurring and cumulative penalties for failure to comply with the order, impose upon the attorney general of the State the duty to and that he would, enforce such penalty provisions (R. 14, 15).

The defendants filed no answer and did not otherwise controvert the allegations of the complaint or counter in any

respect the affidavits filed in support of the application for temporary restraining order. The defendants filed only a demurrer and motion to dismiss (R. 43, 44, 46).

The suit was on October 8, 1935, upon argument and brief, submitted to the three-judge court upon the jurisdictional questions raised by the demurrer and motion to dismiss (R. 45-47).

On February 3, 1936, the three judges filed a memorandum opinion granting the motion to dismiss the suit for lack of jurisdiction (R. 48-49). In this memorandum opinion the court does not discuss the questions involved, but disposes of this suit by the following:

> "The legal questions involved in these motions are like those before a three judge court convened at Helena June 5th, 1935, wherein three Public Utility Companies brought suits against the Public Service Commission of Montana, seeking the same injunctive relief as in the instant cases, and upon the same grounds, and were met with like motions to dismiss for lack of jurisdiction. An opinion in the aforesaid cases of June 5th, 1935, was filed in said court on Nov. 20th, 1935, in which all three judges concurred. We have considered that opinion in connection with the arguments and briefs of counsel in the present cases and agree in the main with the text and reasoning therein, and the authorities relied upon to support it. (*Montana Power Co.* v. *Public Service Com.*, No. 1506, *Butte Water Co.* v. *Public Service Com.*, No. 1513, *Fred A. Horning* v. *Public Service Com.*, No. 1514)" (R. 48-50).

The complainant, on February 5, 1936, filed an application for stay, *i. e.*, to continue the temporary restraining order in effect, under bond and conditions to be prescribed by the court, pending appeal to the Supreme Court of the United States (R. 51-52). This application was heard be-

fore one of the Judges of the court (Judge Pray) at Great Falls, Montana on March 6, 1936. Complainant at the hearing on application for stay presented evidence through witnesses in support of its application. Defendants presented no evidence (R. 53). The record thus made was transcribed and copies, together with briefs of counsel, forwarded at the direction of Judge Pray to the other members of the three-Judge Court, viz., to Hon. Bert E. Haney, Circuit Court of Appeals for Ninth Circuit, San Francisco, California, and Hon. James H. Baldwin, U. S. District Court, Montana, the latter then presiding pursuant to assignment in the United States District Court for the District of Arizona (R. 69). On April 9, 1936, the application for stay was by order of the three Judges denied and the temporary restraining order dissolved (R. 54). Decree of dismissal of the suit was filed on April 9, 1936.

Between October 8, 1935, when the suit was argued and submitted to the three-Judge court on application for interlocutory injunction and February 3, 1936, when the court filed its memorandum opinion granting defendants' motion to dismiss for lack of jurisdiction, the time within which complainant might commence an action against the commission in the state courts to vacate its valuation and rate order had expired. The time limitation on such an action is ninety (90) days from date of the Commission's order (Section 3906, Revised Codes of Montana, 1921) of September 13, 1935. This same statute, hereinafter discussed, expressly denies complainant a stay of the Commission's order pending such action.

The bill of complaint, the material allegations of which are admitted by the demurrer and motion to dismiss, discloses that the company presented evidence as to elements

of value, as of December 31, 1934, before the Commission as follows:

Cost of reproduction new (paragraph XI, R. 7)	$235,737.00
Cost of reproduction new less accrued depreciation (paragraph XI, R. 7)	206,864.00
Book Cost (paragraph XI, R. 7, 8)	250,833.37

The bill of complaint alleges that this evidence of value was given no consideration by the Commission (paragraph XI, R. 8) and that no substantial controverting or other evidence was offered by any other party or person with respect to these elements of value (R. 8).

The affidavits accompanying the bill of complaint and filed in support of the application for preliminary restraining order disclose that there was offered in evidence before the Commission a statement showing the assessed value of the company's property in the system involved, was $139,738.00 (R. 33).

Each of the above valuation figures includes a steam plant—the only item of property disallowed by the Commission (R. 21). As an example of the extent and effect of such disallowance, this item (steam plant) with respect to the "Cost of Reproduction, Depreciated", amounts in round figures to $51,823.00 (R. 37). The Cost of Reproduction depreciated is therefore stated in the affidavit accompanying the bill of complaint as $155,041.00 (R. 8, 32), to be comparable with the Commission finding of value of "not to exceed $90,000.00," *i. e.*, with the steam plant eliminated. Under the Commission's order the same disallowance (approximately $51,823.00) would be deducted from the above figures "Reproduction Cost, New", "Book Cost", etc.

In the face of this substantially uncontradicted evidence with respect to value the Commission fixed the rate base at "not to exceed $90,000.00."

As shown by said affidavits accompanying the bill of complaint, the order directs an average reduction in rates of approximately 24.31% and reduces the annual gross revenue in 1934, from $49,268.65 to $34,977.84, or an annual reduction of $14,290.81 (R. 11, 32); that applying the reduced rates to the 1934 business the complainant would suffer an actual out-of-pocket loss of $2,558.11 per year, *i. e.*, the operating expenses would exceed the gross revenue by that amount, without any allowance whatsoever by way of return on the investment.

This makes an admittedly clear case of substantial, daily and continuing confiscation.

Complainant filed its suit in the United States District Court for Montana and presented its application for interlocutory injunction, because of the provisions of Section 3906 Revised Codes of Montana 1921, which reads insofar as material here, as follows:

> "No injunction shall issue suspending or staying any order of the Commission except upon application to the court or judge thereof, notice to the Commission having been first given and hearing having been had thereon; *provided, that all rates fixed by the Commission shall be deemed reasonable and just and shall remain in full force and effect until final determination by the courts having jurisdiction.*" (Italics ours.)

This section clearly denies an injunction *pendente lite* against a rate reduction order of the Commission.

While no direct challenge to the constitutionality of the foregoing statute has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to and applied the proviso above quoted.

The section was quoted in *Billings Utility Co.* v. *Public Service Commission,* 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie lawful,* can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just until final determination by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission* v. *Great Northern Utilities Co.,* 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute *prohibits the court* in such an action from *issuing an injunction pendente lite* and declares that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction' (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, *ex officio,* the Public Service Commission of Montana (Section 3880, Revised Codes of Montana, 1921). In the act creating the parent Board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390, Revised Codes, 1907) reading, in part, as follows:

> "That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive:* and provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana, in *State ex rel. Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, 233; 163 Pac. 115 (1917) and this conclusion expressed:

> "Provisos to the same effect are found in section 4391. They are not expressed in the most apt and appropriate terms; yet it is obvious, we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a* railroad *company* as well as the shipper, *of the right to invoke,* and *prohibits the court from issuing a preliminary injunction in this behalf.*" (Italics ours.)

The defendants, in support of their demurrer and motion to dismiss, contended the Johnson Act, *post,* removed from the Federal District Courts jurisdiction in suits such as the one at issue, and further contended the decision in *Porter* v. *Investors Syndicate,* 286 U. S. 241, 76 L. Ed. 1226, 52 S. Ct. Rep. 617, was controlling of the issue.

The complainant contended that: (a) the Johnson Act did not remove the jurisdiction but specifically retained it in the Federal District Court, where with respect to rate cases, admittedly involving confiscation, the State law did not provide a "plain, speedy and efficient remedy" to protect against substantial, daily and continuing confiscation; (b) the laws of Montana did not provide such a remedy—

but on the contrary, such laws expressly deny the complainant an injunction *pendente lite;* (c) the *Porter* case, *supra,* is not applicable because it was based upon other and dissimilar statutes, *i.e.,* (1) statutes giving the State court legislative powers or functions and making the rule in the *Prentis* case applicable, and (2) supersedeas was available in the *Porter* case under the general appellate and procedural statutes of the State; (d) neither of these grounds was present in the instant suit; and (e) the rule announced in *Pacific Telephone and Telegraph Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553, is controlling of the issue presented.

The Johnson Act (Act of Congress, May 14, 1934—48 Stat. at L. 775, Chap. 283, 28 U. S. C. A., Sec. 41 (1)) provides as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain, the enforcement, operation, or execution of any order of an administrative board or commission of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics ours.)

By the italicized proviso, the Johnson Act specifically retains jurisdiction in the Federal courts to grant injunctive relief in confiscation cases such as that here presented.

In fact, the constitutionality of the Johnson Act itself would be in serious doubt were it not for this saving clause.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee,* — U. S. —, 80 L. Ed. —, 56 Sup. Ct. Rep. 300.

Corporation Commission of Oklahoma et al. v. *Cary, Trustee,* 9 Fed. Supp. 709.

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen his rights under the Federal Constitution nor his resort to this Court in situations such as are presented by the instant suits wherein it is so apparent the State process is inadequate to afford relief.

Probably the best evidence of this is a statement of the Honorable John E. Benton of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27th, 28th and March 1st, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45740, at p. 216-217.) Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot, under the statutes of many, and perhaps most, states, be obtained by a utility during the process of appeal from a commission through the state courts.'

"The later statement in the brief, referred to in the quotation just made, appears on page 8:

" 'The State courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'

"Similar statements have been made during the hearing by other utility counsel.

* * * * * * *

"Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be applicable,* in any state *where the courts* of the state *do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where 'a plain, speedy, and efficient remedy' may be had in the state courts.

"The construction of the bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act applies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. The *right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal Courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy' this act will not apply; and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

It is complainant's position the Federal Court has jurisdiction of the instant suit by virtue of the italicized proviso in the Johnson Act above, for the reason that Section

3906, Rev. Codes of Montana, 1921, denying as it does a stay or supersedeas pending final determination in a confiscation case—specifically denies to the complainant a 'plain, speedy and efficient remedy', in the courts of the State, to protect it against such confiscation of its property.

The defendants, further contended that Section 3906 Montana Code 1921, was unconstitutional, stated they would so concede, and suggested complainant could secure injunctive relief under the general statutes of the State.

The three judge court apparently agreed with this argument, for it states (in its opinion of November 20, 1935, R. 50) that the decision in *Porter* v. *Investors Syndicate, supra.*

> (a) "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, unconstitutional and void, as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment" (R. 50).

and

> (b) "If the Supreme Court were to write a decision for our guidance in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz; Section 9243, which reads: 'Injunctive Order—When Granted; An injunctive order may be granted in the following cases;'
>
> " '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such

relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

"'2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.'"

We respectfully differ with the three-judge court in their interpretation of the *Porter* case, *supra,* and the application of the statutes of Montana referred to in that case.

The *Porter* case is not controlling here and the statutes in question in that case were materially different from Section 3906 referred to in the instant suit.

In the first place, the *Porter* case was a *Prentis* case, the State court having authority to "set aside, modify or confirm" the order of the State auditor—*Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

This is not a *Prentis* case—the State courts may only "vacate or set aside" Public Service commission rate orders. (Section 3906 Montana Code 1921.) In the second place, under the Montana statutes being considered in the *Porter* case direct provision was made for supersedeas or stay under the general statutes of the State (Secs. 4038 and 9243 as amended).

The statutes considered in the *Porter* case related to the powers and duties of another State officer (State auditor—ex officio Investment Commissioner) and had no relation to the statutes governing the Public Service Commission of Montana. In other words, the statutes considered in the *Porter* case are not the statutes applicable in the instant suit. As hereinafter discussed they gave to the courts of the State, powers upon review and authority with respect to stay, which were the exact opposite of the statute here in question.

In the *Porter* case, the Court was considering Sections 4038 and 9243 Montana Revised Codes, 1921.

Section 4038 Montana Revised Code, 1921, as amended by Ch. 194 Session Laws of 1931, is a part of Chapter 264, is known as the Blue Sky Law and is the Montana Act prescribing the powers, duties and functions of the State auditor (ex officio Investment Commissioner) who revoked the Syndicate's license in the *Porter* case. Section 4038 which provides the appellate procedure from his determinations, reads in part as follows:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the District Courts of this State * * * ."

Section 9243 referred to in the *Porter* case and in the opinion of the three judge court, relates to injunctions in equitable actions and is the general statute referred to in Section 4038. Neither Section 4038 nor 9243, *supra,* has any relation to the powers, duties or functions of the Public Service Commission of Montana. Section 9243 is quoted herein at pp. 14-15.

The sole powers of the courts of Montana with respect to Public Service Commission orders, are found in Section 3906 *supra.* Section 3906 is complete in itself, both with respect to functions of the State court in its final determinations and with respect to supersedeas or stay. Neither Section 3906 nor any other section of the Public Service Commission laws of Montana authorize or contemplate a resort to Section 9243, *supra,* or any other or general laws for appellate or injunctive relief pending appeal—the remedy is exclusive.

Neither do we agree with the three-judge court that the decision in the *Porter* case is "a direction" to that court to hold Section 3906 unconstitutional. On the contrary, the

court in the *Porter* case in discussing the meaning of Section 4038 of the Blue Sky Law, said:

> "We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler,* 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.
>
> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board of commissioners. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (*Pacific Teleph. & Teleg. Co.* v. *Kuykendall,* 265 U. S. 196, 203 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the state court interpreting the act* (*Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.*" (Italics ours.)

In *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 Sup. Ct. 553, the Supreme Court said (L. Ed., p. 981):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity* and *is not required to*

establish that the state statute is not invalid under the state constitution. Dawson v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In *Union Pac. R. Co.* v. *Weld County*, 247 U. S. 282, 287, 62 L. Ed. 1110, 1117, 38 S. Ct. 510, the Court said:

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of state* law, and, so far as we are advised, the Supreme Court of the state has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined.* (Italics ours.)

The quoted language from Sec. 3906, *supra,* is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission, giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52, Section 3880, in part, reads as follows:

> "The Board of Railroad Commissioners of the State of Montana shall be ex-officio the Public Service Commission hereby created, and for the purpose of this act shall be known and styled 'Public Service Commission of Montana.' • • • and in the name as

above set forth, it may sue *and be sued in the courts* of the state and of the United States. * * *'' (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the State or Federal court. Section 3880, *supra,* contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, *supra,* was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two State laws, one denying complainant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order and the other authorizing the Public Service Commission to be sued in this Court compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy in consfication cases) by inviting resort to the Federal courts.

(e).

Cases Believed to Sustain Jurisdiction.

Pacific Telephone & Telegraph Co. v. *Kuykendall,* 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553;

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

Union Pacific R. Co. v. *Weld County,* 247 U. S. 282, 62 L. Ed. 1110, 38 S. Ct. 510;

Dawson v. *Kentucky Distilleries, etc.*, 255 U. S. 288, 65 L. Ed. 638, 41 S. Ct. 272;

Love v. *Oklahoma Operating Co.*, 252 U. S. 331, 64 L. Ed. 596, 40 S. Ct. 338;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527;

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124;

Atlantic Coast Line v. *Daughton*, 262 U. S. 413, 67 L. Ed. 1051, 43 S. Ct. 620;

Davis v. *Wakelee*, 156 U. S. 680, 39 L. Ed. 578, 15 S. Ct. 555;

Ohio Oil Co. v. *Conway*, 279 U. S. 813, 73 L. Ed. 972, 49 S. Ct. 256;

Corporation Com. of Oklahoma v. *Cary, Trustee*, — U. S. —, 80 L. Ed. —, 56 S. Ct. 300;

Corporation Com. of Oklahoma v. *Cary, Trustee*, 9 Fed. Supp. 709.

(f).

Matter in Which the Specially Constituted District Court of the United States Abused Its Discretion.

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding in its decision that the State of Montana affords "a plain, speedy and efficient remedy at law or in equity" in its courts within the meaning of the Johnson Act (Act of Congress of May 14, 1934; Judicial Code, Sec-

tion 24, 28 U. S. C. A., Section 41, Chapter 283, Section 1, 48 Stat. 775).

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In sustaining the motion to dismiss for alleged lack of jurisdiction.

5. In refusing to issue the interlocutory injunction as prayed for.

6. In denying complainant a stay pending appeal to the Supreme Court of the United States.

7. In placing complainant to the hazard of severe and drastic penalties for failure to comply with said Commission order and submit to the confiscation of its property.

8. In failing to grant a stay pending appeal to the Supreme Court of the United States, requiring complainant to impound the difference between the existing and the reduced rates, and furnish a bond for the faithful compliance with such impoundment as has been done under the requirements of the preliminary restraining order.

Respectfully submitted,

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Dated April 17, 1936.

Filed April 17th, 1936. C. R. Garlow, Clerk.

(7737-C)